station." *Id.*, at para. 96. Without generally refuting the ALJ's portrayal of the activities of certain principals of C30-I and C30-II, and more specifically the activities of attorneys Parker and Rosenbloom, Solano's exceptions contend that the ALJ's "conclusions bear absolutely no relationship to the actual record evidence" but rather "rely on a pick and choose approach, with [record] citations to a handful of out-of-context questions and answers and serious distortions of the facts."[24] Thus, Solano submits that three out of SBC's four "general" partners have appreciable broadcast experience, and it was their decision to seek the financial support of a "limited" partnership to obtain the necessary backing for the station.[25] Moreover, Solano contends that the "limited" partners of C30-I and C30-II have exerted no influence over SBC or its principals, and will exercise no control over Solano's future business affairs. Its exceptions highlight transcript citations claimed to support the proposition that SBC's four "general" partner principals were, in fact, actively involved in the preparation of the application and the conduct of Solano's later activities.

23. Before we review the actual record, we must confront a preliminary matter of law relating to the question of whether attorneys who actively participate in the affairs of a broadcast applicant may be considered "passive" investors of the applicant, so that the equity interests of such attorneys are not attributable for our purposes of calculating their applicant's "diversification"[26] and "integration" factors. Solano's exceptions do not deny that Parker and Rosenbloom have been very actively involved in the applicant's affairs to date, at least to the extent of providing critical legal advice throughout the whole of Solano's existence. *See* Solano Exceptions *passim*. But, as expressly discussed in several recent cases, the Commission has held, as a matter of law, that attorneys who hold equity interests in an applicant and who simultaneously perform legal services for that applicant cannot be considered mere "passive investors." Hence, in *Mark L. Wodlinger*, FCC 88R-29, released June 1, 1988 (at para. 9), the Board applied the policy set forth in the Commission's *Clarification on Ownership Attribution*, 1 FCC Rcd 802, 804 (1986)(emphasis added), which holds that such attorneys must be considered "active" principals because:

> it would be difficult to envision legal services that are more directly related to the media activities of the partnership than those concerning the licensing and operation of broadcasting entities.
>
> * * *
>
> A partner whose contribution to the partnership is in the form of personal services and expertise rather than in the form of a financial investment *is the antithesis of a passive investor*.

In *Wodlinger*, therefore, the Board attributed to the affected applicant the 50% equity interest of an attorney who had played an active role in the affairs of that applicant, thus reducing its overall quantitative "integration" factor to 50% because the *Wodlinger* attorney, like Parker and Rosenbloom here, did not propose to actually "integrate" into the station's management. *Accord*, *Washoe Shoshone Broadcasting*, 88R-30, released June 13, 1988 (at para. 18) (Rev. Bd. 1988)(attorney's 20% equity interest not excluded from his applicant's "integration" calculations).

24. In view of the extensive involvement of attorneys Parker and Rosenbloom in Solano's most basic operational affairs and the conclusive presumption of "active" participation of attorneys iterated in the Commission's 1986 *Clarification on Ownership Attribution*, it is manifest that the Board cannot consider those two Solano principals to be purely "passive investors," and *Wodlinger* is now controlling as case precedent.[27] A more difficult question here, though, is whether to include in our "integration" calculations only the personal equity interests of Parker and Rosenbloom, or whether Parker's participation in Solano's affairs was in a representative capacity for *all* of his C30-I co-partners, and that of Rosenbloom for his C30-II co-partners, with the net result that both of these two "limited" partnership legs of the Solano triumverate must be considered "active" members of the composite applicant. Based on the record in this proceeding, we must find that C30-I and C30-II, acting through Parker and Rosenbloom respectively, exceeded the Commission's boundaries for true "limited" partners. As reaffirmed several times, the Commission has indicated that it will not consider "passive" any principal of a broadcast licensee where that putatively passive principal has any material involvement in the subject entity's affairs. *See, e.g.*, *Ownership Attribution*, *supra* note 6, 58 RR 2d at 616-620. Through Parker's representation, the C30-I partners have here been materially involved in Solano's affairs to this date. The same must be said of the C30-II principals who, through their representative partner, Rosenbloom, have gone beyond the Commission's declared "active"/"passive" borders.

25. But even if we put aside, *arguendo*, the "active" status of Parker and Rosenbloom in orchestrating and directing Solano's most basic affairs, other substantial evidence of record creates serious doubts that the four "general" partner principals of SBC were ever truly at the helm of the Solano enterprise. For instance, although the Commission's current broadcast application form (FCC Form 301) does not even solicit the identities of an applicant's "limited" partners, the "general" partners must certify - under penalty of perjury - that "sufficient net liquid assets are on hand or available from committed sources to construct and operate for three months without [operating] revenue." FCC Form 301, Section II. In that regard, the Board has held that the so-called "active" principals - who bear the factual and legal burden of FCC application certification - may not for certification purposes rely simply upon the undocumented assurances of the applicant's "passive" principals that all of the necessary finances will be forthcoming, without acquiring firsthand knowledge of the sufficiency of the assets upon which their personal certification is based. *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 787-789 (Rev. Bd. 1986). To permit such principals to certify to their financial resources on nothing but the undocumented assurances of other "passive" principals would be to negate entirely the efficacy of the sworn certification itself.[28] Here, the record reflects that - at very best - only one of Solano's four "general" partners had an understanding of Solano's potential financial resources. Indeed, at hearing,

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SBC's President (and 31.67% equity holder). Henry T. Mendoza, was questioned about Solano's finances and its FCC financial certification:

> Q. Did you at the time know what -- was it your understanding that the basis for this certification was bank financing?
>
> A. Not bank financing.
>
> Q. What was your understanding of the source of the funding?
>
> A. My understanding of the source of the funding was that the limited partners had guaranteed that they could come up with enough money to operate the station as we proposed to do it if we got the license.
>
> Q. Had you ever been shown financial documentation supporting that proposition, balance sheet, financial –
>
> A. Me personally?
>
> Q. Yes.
>
> A. No.
>
> Q. Do you have any knowledge whether Mr. Pattison was shown that documentation?
>
> A. I have no knowledge.

Tr. 579. Although Solano claims that SBC "general" partner Patrick Pattison was aware of Solano's financing, none of the other three "general" partners exhibited an inkling of the basic financing of their proposed station. In fact, when questioned at hearing as to whether he understood his liabilities as a "general" partner of Solano, David Garcia (one of SBC's four principals) replied: "No." Tr. 664. Although Garcia testified that he "glanced" at Solano's limited partnership agreement, he did not know any of its "limited" partners, Tr. 658-660, and he indicated that Rosenbloom had informed him of the identity of SBC's other "general" partners, none of whom Garcia had ever even met. Tr. 661. Garcia also testified that he was not informed of the structure of the company to which he had already lent his name, Tr. 662, and that he did not even inquire as to who his new "limited" partners were. *Id.* Pattison, another SBC "general" partner, and its proposed station general manager, was equally uncertain of the role of Solano's "limited" partners:

> Q. Do you know what the financial involvement and when I say you, do you or to your knowledge does Solano Broadcasting Company know what the financial involvement of the limited partners have been to this point?
>
> A. The financial involvement?
>
> Q. Yes.
>
> A. No.

Tr. 851. Finally, it appears from the Solano "limited" partnership agreement that the putative "limited" partners are liable for *all* of Solano's liabilities and that, upon any default of a "general" partner in paying his (or her) debts to the "limited" partners (who have the *exclusive* right to lend money to the "general" partners for Solano expenses), the "limited" partners may choose new "general" partners. *I.D.*, para. 97. And nothing on this record suggests any ability whatsoever on the part of the four current "general" partners to repay the "limited" partners for their collective 20% equity interest in Solano.

26. Considering all of the foregoing, we cannot find that the four SBC "general" partners have exclusive control over Solano. Solano, based on this record, is nothing more than the artificial construct of two very enterprising attorneys, who put the application together, assembled the (presumed) financing package, and then recruited four putative "general" partners who were not only unfamiliar with each other or their own "limited" partners, but whose general knowledge of the venture to which they had nominally committed themselves was *de minimis*. Hence, we will not affirm even the (maximum) 20% "integration" credit awarded to Solano by the ALJ. Without going so far as to label Solano a "sham" (for we have seen far worse), we reject its most critical claim that the SBC "general" partners are the controlling principals of this applicant.

27. *Buenavision*. The ALJ found that although Buenavision purports to be a partnership composed of three individuals, H. Frank Dominguez (51%), Sylvia Herrera (5%), and Stella Ornelas (44%), all of whom have pledged to "integrate" fulltime at the proposed station, he refused to award this applicant a 100% quantitative "integration" factor. His refusal was based upon two discrete grounds: First, citing *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1055-1057 (Rev. Bd. 1986), the ALJ noted that Buenavision was not secured by a written partnership agreement, either at the time it filed its application or during the hearing, and that, therefore, he could not accept the applicant's quantitative reckoning. *I.D.*, para. 161; and, second, the ALJ found that Dominguez, who owns numerous other communications interests (*see supra* para. 6; *I.D.*, paras. 158-160), has not in fact treated Buenavision as a partnership at all, but as a sole proprietorship wherein Ornelas and Herrera "are nothing more than nominal partners with no influence or control" over Buenavision's affairs. *I.D.* at para. 164. Buenavision argues that it should not be bound by *Payne* retroactively, and that Ornelas and Herrera are genuine partners who will have ownership responsibilities at the proposed station.[29]

28. As explained in *Payne*, the Commission's award of a preference for ownership "integration" credit is premised upon its expectation that applicants who receive such a preference will adhere to their pledges "on a permanent basis," *Policy Statement*, 1 FCC 2d at 395 n.6; *see also Reginald A. Fessenden Educational Fund*, 100 FCC 2d 440, 451 (Rev. Bd. 1985), *review denied*, 59 RR 2d 1267 (1986), and that mere oral understandings - terminable at will or whim - provide insufficient assurance of the stable ownership structure necessary to predict such permanence. *See Payne*, 1 FCC Rcd at 1056. Moreover, our *Payne* decision observed that, until a paperwork reduction revision of our broadcast application form, all applicants were required to submit therewith their basic organizational documents so that the Commission could be completely certain of the actual identities of the applicants' equity holders as well as the legal nature and extent of those equity interests. *Id.* In revising its broadcast application form in 1981,[30] the Commission merely eliminated the prior requirement that an applicant *submit* its organizational documents to the Commission at the time of application; but, the application form itself (FCC Form 301, General Instruction E) contin-

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ued to require that such documents "be made available for inspection by the public." Nothing in the Commission's 1981 revision of its Form 301 relieved an applicant of the obvious necessity to *actually be* of legal form and substance at the time of application. Unless an applicant possesses a formal legal identity and structure at the time of application, it is unclear to whom any Construction Permit grant should be made.[31]

29. The case at hand provides a perfect example of just why we cannot accept, for critical comparisons between applicants, a claim that an applicant is bound together by nothing more than an "oral understanding." For as the ALJ here found, Buenavision is - in soul, spirit and substance - the creature of Frank Dominguez. We have reviewed the underlying record and find that the ALJ synopsized accurately and well the facts surrounding the Buenavision application. Thus:

> Ms. Ornelas and Ms. Herrera had not even spoken to each other until the date of the hearing (Tr. 1195), and there had been no partnership meetings or telephone conferences between the partners concerning the partnership business (Tr. 1122, 1195). Neither person had any input concerning the decision to establish the Executive Committee which is charged with running the station (Tr. 1176, 1232), and both testified that they did not discuss their proposed management positions with anyone, including Mr. Dominguez (Tr. 1164, 1189-92, 1205-06, 1226-27). Ms. Ornelas first learned of her position as Public Affairs Director from reading Buenavision's integration statement after it had been filed (Tr. 1191, 1206-07). Ms. Herrera learned of her position as Community Affairs Director in the same manner (Tr. 1226).

I.D., at para. 163. Moreover:

> there were no discussions prior to the filing of the Buenavision application between Mr. Dominguez and Ms. Herrera as to the terms of the partnership (Tr. 1225-26, 1235). In addition, nothing was said as to her particular role at the station (Tr. 1215-16, 1218-19), what her salary would be (Tr. 1235), or about the nature of the partnership's management structure (Tr. 1228). Similarly, no one explained to Ms. Ornelas the substance of any of the terms of the preexisting oral partnership agreement when she was brought into the partnership just shortly before the B cutoff date (Tr. 1167). She testified that she first learned of her 44 percent interest in the applicant one week after the B cutoff date amendment was filed (Tr. 1167, 1189-90). Ms. Ornelas did not discuss the matter with Mr. Dominguez (Tr. 1118), and no one asked her if she agreed to take a 44 percent interest and presumably, no one asked her whether or not she could afford such an interest (Tr. 1167-68). As of the date of the hearing, the only terms of the Partnership Agreement apparently decided among the partners were each partner's share in the station's profits, the equal voting provisions, and each partner's responsibility for a portion of the debt of the venture (Tr. 1073, 1166). No other terms which are typically indicated in a partnership agreement were even discussed, such as what happens on the death of a partner (Tr. 1233). All of these decisions were left entirely up to Mr. Dominguez.

I. D. at para. 162. We firmly agree with the ALJ that this is no *bona fide* "partnership", in word or deed, but a wholly fictional contrivance of Dominguez, knowingly intended to artificially skew our comparative processes. *See generally supra*, para. 8 & note 15. While we make nothing of the ALJ's conclusion that Dominguez has "controlled" Buenavision (Dominguez is openly said to hold a 51% interest), we find that the other two purported principals were hastily recruited as partners in name only, and that neither had any clear idea of any rights or obligations (particularly financial) they might now have, or incur in the future, as Buenavision principals. Or of any actual managerial authority or responsibility at the proposed station. Buenavision is all smoke, and Dominguez the smoke machine. At very best, Buenavision would garner only a 51% "integration" factor for Dominguez, leaving it far out of the running. At worst, it is yet another sham. *See Pacific Television, supra.*

30. *SSP.* The ALJ awarded SSP a 51% quantitative ownership "integration" factor, corresponding directly to the percentage equity interest of Sandra S. Phillips, the sole "general" partner of the applicant, and the only SSP principal proposing to be involved in the management of the intended broadcast facility. *I.D.*, para. 168. The remaining 49% of SSP, a California limited partnership, is the ARW Company, whose stock - in turn - is wholly owned by Larry Hillblom. *Id.* Although SSP's 1983 limited partnership agreement conforms to the Uniform Limited Partnership Act (as well as to state law), the ALJ declined to regard the 49% equity holder (ARW) as "passive" because SSP's agreement:

> contains no provision restricting the limited partner or any of its principals from being an employee, agent or consultant to the partnership's proposed station, or otherwise prohibiting the involvement of the limited partner or its principals in the operations of the proposed station. Furthermore, the Agreement is silent as to the financial obligations of the principals, although it appears from the testimony that the parties to the Agreement view Ms. Phillips as having no obligation to make any capital contributions to the venture (Tr. 1291-92).

I.D. at para. 176. On exception, SSP complains that its 1983 limited partnership agreement complies with the general FCC requirements in effect at the time it was formed,[32] and that the Commission did not (1) even enunciate its limited partnership requirements until its 1984 *Ownership Attribution* report; or (2) begin to require the explicit contractual provisions referenced by the ALJ until a 1985 reconsideration of its *Ownership Attribution* report. *See supra* note 6. Arguing that it has been unfairly victimized by the retroactive application of the Commission's 1985 *Ownership Attribution* reconsideration standards to a limited partnership agreement executed in 1983, SSP cites our language in *Independent Masters, Ltd., supra*, 104 FCC 2d at 188 n. 25, for the proposition that we should not apply literally the greatly strengthened 1985 limited partnership insulation standards to entities formed prior thereto.

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31. We concur with SSP's reading of *Independent Masters*. *See also Chester Associates*, *supra*, 2 FCC Rcd at 2031 n.9. In *Chester*, the Board explained further that while it would not retroactively demand literal compliance with the strictures of the Commission's 1985 *Ownership Attribution* reconsideration, it would generally consider the Commission's *Ownership Attribution* requirement that limited partnership agreements assure that the "limited" partners not be "involved in any material respect in the management or operation" of the subject partnership. *See Ownership Attribution*, *supra* note 6, 58 RR 2d at 618 (quoting original 1985 *Ownership* Attribution order, 97 FCC 2d at 1023). SSP here concedes that its limited partnership agreement does not contain the specific contractual clauses articulated in the 1985 Ownership Attribution reconsideration order. But, as in *Chester Associates*, the SSP agreement is said to incorporate the ULPA, a contention no party here seriously challenges. Furthermore, SSP submits that its "limited" partner (ARW) had no input into the application prior to its filing; that its "general" partner (Phillips) did not consult with the "limited" party as to any aspect of prosecuting the SSP application; and that[33]:

> By executing the Certificate of Limited Partnership, SSP was certifying under oath to the State of California that its Limited Partner would not be involved in the day-to-day operation of the business and would not otherwise exert control of the management of the business. In specifying in Paragraph XV that limited partners are given no rights to elect or remove a general partner, terminate the partnership, amend the agreement, or sell assets, SSP was further limiting the minimal statutory powers granted its Limited Partner. On its face, SSP has fully demonstrated that the de jure control of SSP is firmly lodged with the General Partner. The Partnership Agreement and the record itself are in direct contravention to the Findings of the Judge below.

Nothing in the *I. D.*, or in the underlying record, or even in the exceptions discredits these SSP representations. Accordingly, we must agree with SSP that the ALJ's conclusion that SSP's "limited" partner will not assume a "passive" role in this partnership's affairs is not supported by the requisite substantial evidence of record. Although the ALJ seems to have assumed that because the "limited" partner here would be furnishing virtually all of SSP's initial financing, it - not Phillips - would possess *de facto* control, *see I.D.*, para. 176, we cannot endorse that presumption. It is true, we concede, that the Commission until very recently regarded financial domination (or even strong financial leverage) to be a very strong indication of *de facto* control, or potential *de facto* control. *See, e.g.*, *Heitmeyer v. FCC*, 95 F.2d 91, 99 (D.C. Cir. 1937)("It is well known that one of the most powerful and effective methods of control of any business, organization, or institution . . . is the control of its finances"); *accord WLOX Broadcasting Co. v. FCC*, 260 F.2d 712, (D.C. Cir. 1958); *Stereo Broadcasters, Inc.*, 87 FCC 2d 87, 95 (1981)(control of finances one of the factors considered "most indicative" of control). Whatever the Commission's past equation of financial control with ultimate *de facto* control of an entity, it is obvious from recent case law that the Commission no longer draws a strong correlation between the two. *E.g.*, *KIST Corp.*, *supra*, 102 FCC 2d 288, 290-291 (1985); *Victory Media*, *supra*, at para. 9 & n.1.

32. For all of the foregoing reasons therefore, we shall modify the ALJ's "integration" award to SSP, and elevate its quantitative factor to the 100% to which it is by operation of law entitled, *i.e.*, by extrapolating Phillips' 51% equity interest as SSP's sole "general" partner to an *effective* 100% management control factor.

33. *Good News*. After considering the totality of the record evidence, the ALJ rejected this applicant's central claim that it is, and will in the future be, solely controlled and managed by its 10% "general" partner; rather, he found that the applicant is a product of, and controlled by, Good News' 90% "limited" partner, Elias Malki Middle East Gospel Outreach, and - more specifically - Elias Malki himself. *See I.D.*, paras. 198-204. The ALJ reports that, until the "B" cut-off deadline, Malki "was president of [the] applicant's general and limited partners" and "was also designated to serve as general manager of the proposed station." *Id.*, at para. 196. However, when advised by counsel that he should resign as president of the "general" partner (then composed of four individuals), Malki replaced himself as President of the "general" partner with his own daughter (Rebecca Ekizian), who is now said to be the chief "general" partner in the Good News combine. Notwithstanding Malki's alleged withdrawal from the "general" partnership, Malki - as president of Good News' 90% "limited" partner - was seen by the ALJ as continuing to be the dominant Good News principal. For example, the ALJ notes that even after the Good News partnership agreement was amended, Malki attempted to retain control of Good News by providing in the revised agreement that his "limited" partnership would retain the power to unilaterally remove any "general" partner. *Id.*, para. 198. Later, upon advise of counsel, that particular provision was removed; but:

> The amended Agreement, however, continues to provide that no additional persons can be admitted as either a general partner or a limited partner without the written consent of the limited partner (SSP Exh. 6, Provision 9; SSP Exh. 7, provision 9). Furthermore, the Agreement is silent as to how the parties' interests are voted in partnership matters. One of the directors of the general partner testified that the limited partner votes its 90 percent interest and each of the three directors of the general partner individually votes her respective 3 1/3 percent interest (Tr. 1340-41, 1343).

Id. In its exceptions, Good News concedes Malki's total dominance of the applicant up until the "B" cut-off deadline, but submits that the record evidence is insufficient to show that its three "general" partners have not controlled Good News since Malki's reluctant withdrawal as managing "general" partner. It relies primarily upon the Commission's decision in *KIST Corp.*, *supra*, for its postulate that the Commission will accept, at face value, even the most improbable claims as to ownership structure and management control, if the written partnership agreement establishes "the proper division of authority."[34]

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34. We find that neither *KIST Corp.* nor any subsequent case stands for the proposition that the Commission will ignore any and all extrinsic evidence that an applicant's purported ownership structure falsely portrays the true and actual locus of control in that entity. Indeed, *KIST* itself is a testament to the heightened scrutiny to be given an application where it appears that the party actually controlling an applicant contrives to camouflage that control by interposing a false layer of purportedly "active" principals so as to artificially enhance its comparative position. Specifically reaffirming in *KIST* its previous warning that it would sharply strike down any "sham" applications, *see id.*, 102 FCC 2d at 290 n. 5, the Commission affirmed the Board's rejection of an application where the alleged "active" principal (1) "exercised virtually no control over the preparation of the application"; (2) "had no involvement in obtaining financial commitments"; (3) "ha[d] contributed no capital to the enterprise; and (4) where the putatively "passive" principal had "clearly dominated the affairs" of the applicant. *Id.*, at 292-293 n.11. Likewise, in *Pacific Television, supra*, the Commission rejected as a "sham" the application of an entity where an allegedly "active" principal was uncertain as to even the voting structure of the partnership, *see id.*, 3 FCC Rcd at 1700, and where the equity contribution of that principal had been paid by her brother, another partner, a contribution to be "reimburs[ed] at some unspecified time in the future" (*id.*).

35. The record evidence against Good News is, if anything, much stronger than that laid out by the Commission in *KIST* or *Pacific Television*. Good News concedes, as it must, that until Malki's last-minute withdrawal as its President (in favor of his own daughter), Malki made all of the decisions concerning the application, including the form and contents of the Good News application itself.[35] Further, it's exceptions acknowledge "that Elias Malki paid the general partner's [sic?] initial capital contribution, and . . . assumed the financial responsibility for prosecuting [Good News'] application."[36] And, other than Malki, none of this applicant's principals, and especially its reputed "general" partners, exhibited more than the slightest acquaintance with the company they reputedly "controlled". Thus, as the ALJ found, one of the three putative "general" partners, Shirley Robbins (Good News' Secretary), had not maintained the applicant's books and records. Tr. 1321. Even more basically, when asked how the partnership would function, Robbins testified:

> Q. On a matter on which the partnership as a whole must vote, does the limited partner vote its 90 percent interest and the general partner its 10 percent interests?
>
> A. Yes.
>
> Q. At a meeting of the limited partnership, who will vote for the general partner?
>
> A. Who will vote for the general partner?
>
> Q. Yes.
>
> A. The general partners.
>
> Q. You'll all vote three and one-third percent or will one person vote the 10 percent?
>
> A. No, no. The three.
>
> Q. All three of you will vote your respective shares?
>
> A. Right.

Tr. 1340-1341. In other words, Robbins seemed to believe that the three "general" partners would command only 10% of the vote on critical business matters. She also testified that Malki never told her of his own investment in the station. Tr. 1344, and that - even as the partnership's purported Secretary - she could only recall "some" of the details of the Good News partnership agreement. Tr. 1347. Incredibly, Robbins acknowledged that she had never met Ekizian, with whom she had casually agreed to become a "general" partner, and who - for reasons Robbins was unaware of - became the instant President of Good News when her father "withdrew" for strategic reasons. Tr. 1348. It seems to have neither occurred nor mattered to Robbins that she had just taken on an unknown business partner (Ekizian) who, as President of the "general" partnership, could bind the partnership (and Robbins personally) to the enormous legal and financial liabilities attached to the construction and operation of a full power television station.

36. Just as implausible was the testimony of a second Good News' "general" partner, Viola Douglas. While identified as the partnership's Treasurer, Douglas had very little knowledge indeed of her company treasury. She did not recall who opened the "general" partner's bank account, Tr. 1483, and she did not know how she got its checkbook. Tr. 1486-1487. Equally as astonishing, Douglas evinced no understanding of the impact of her new "general" partnership on her *personal* treasury. For instance, Douglas could not say for certain whether she was legally obligated for any of Good News' expenses in prosecuting this application; when asked whether such expenses were solely the responsibility of the "limited" partner, Good News' Treasurer responded:

> Q. That's entirely the limited partner's responsibility? I'm waiting for an answer. Is that entirely the limited partner's responsibility?
>
> A. I can't say it's a responsibility, but I believe – well, I'll withdraw that because I don't know. I would hate to place something on – and then it's not there.

Tr. 1509-1510. Good News' President, Ekizian, knew even less than her Treasurer about the applicant's finances. *See I.D.*, paras. 200, 201 (and transcript passages cited therein). Finally, although Good News asserts that Malki retreated to the role of a "limited" partner prior to the application amendment deadline, the "general" partners seem to think that they will be "working together" with Malki once their application is granted. *See, e.g.*, Tr. 1396.

37. For these reasons, as well as those additionally expressed by the ALJ at *I.D.*, paras. 202-203, we affirm his conclusion that Good News is (not surprisingly) controlled by its 90% owner, Elias Malki. Ignoring, for the moment, the minimal 3 1/3% equity interest of each of the three "general" partners (equity interests so insignificant that they are, in fact, not even cognizable by the Commission as palpable ownership interests in media properties, *see Ownership Attribution, supra* note 6[37]), and the fact that the 90% equity principal, Malki, had furnished every material element of the entire Good News application, in-

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cluding all of its financing, its lawyers, and its engineer, the preponderance of the other record evidence demonstrates that the three so-called "general" partners are no more than paper proxies for Malki. As was the case with San Bernardino Broadcasting (*supra*, paras. 15-18) and Buenavision (*supra*, paras. 27-29), Good News is another of those "'sham' ownership structures" artificially projected "to take advantage of various comparative preferences" (*see supra* note 15). The last-minute "withdrawal" of Malki was exposed on this record as transparent legerdemain, which fooled no one, least of all Malki's three hasty conscripts, who knew (or disinterestedly assumed) from the outset that they were essentially window dressing in Malki's Middle East Gospel Outreach boutique. As did the ALJ, we say: No sale!

38. *Inland Empire*. Structured also as a two-tiered partnership, with three "general" partners and nine "limited" partners, Inland Empire as well sought a 100% quantitative "integration" factor for proposing that all three of its "general" partners (owning just over 23% of the partnership's total equity) would actively manage the intended station. Its "limited" partners, it contended, are purely passive investors. All three "general" partners (David Duron; Robert Navarro; Susan Racho) have lived in the station's proposed service area for many years and have extensive past broadcast experience. *See I.D.*, paras. 206-220. Unlike several (if not most) of the other applicants here, it appears, *mirabile dictu*, that one of Inland Empire's "general" partners, David Duron, actually took the lead in creating this applicant, structuring its organization, selecting the other two "general" partners for their broadcast experience, local residence, civic activities, *etc.*, and in seeking out resource support from "limited" partners. *See id*, para. 235.[38] Although the record is devoid of incriminating evidence that this applicant is a sham in which - as we have seen with several other applicants above - the so-called "passive" principals were, in fact, the *active* parties (and *vice versa*), the ALJ awarded Inland Empire only a 42.8% quantitative integration factor to correspond directly to "general" partner Duron's "voting" shares of the partnership. *See id.*, paras. 205, 235(a). The ALJ's reasoning stemmed from his reading of two disparate sections of Inland Empire's partnership agreement: Section 7(b), which the ALJ read as providing that "four-fifths of each general partner's interest will vest in stages over a four-year period of time, and each stage in the vesting process is dependent upon that general partner's continued employment at the station" (*I.D.* at para. 232, citing SBB Exh 6.); and Section 12(a) which gives the managing "general" partner (Duron) the right to discharge either of the other two "general" partners as station employees without a showing of good cause. *Id.*

39. Inland Empire's exceptions rejoin that, in construing its partnership agreement, the ALJ read its Section 7(b) out of context. It argues that all three of its "general" partners currently have vested their full equity interests, and that Section 7(b) becomes operative only if a "general" partner elects to quit the partnership or if such a partner is removed by a vote of 80% of the other partners "for good cause, which is limited by definition to four discrete circumstances: death, conviction of a felony, disability for a period of six months, or engaging in an act which could result in the partnership being disqualified as a licensee."[39] It further points out that its Section 7(b) is expressly captioned "Vesting of General Partner's Partnership Interest When Terminating as a General Partner", and that the condition that a "general" partner will lose a portion of equity interest only if he or she does not fulfill the obligation to stay for five years to manage the station compliments perfectly the Commission's requirements that an "integration" pledge reflect an intention to remain for a considerable period (*see supra* para. 28, citing *Policy Statement*, 1 FCC 2d at 395 n.6). And, although Inland Empire concedes that its managing "general" partner, David Duron, does possess authority to remove the other "general" partners as station employees, (1) Duron cannot unilaterally remove them as *partners* without the good cause conditions set forth above and that (2) Section 7(b) of its partnership agreement is an express manifestation of the partnership's strong desire to retain the other two (Navarro and Racho), whom Duron meticulously selected as "general" partners for their past broadcast experience and other personal qualities. It argues, rather cogently we believe, that if it (or Duron personally) harbored any hidden intention to summarily dispatch Navarro or Racho, it never would have invited them to join Inland Empire in the first place or provided in Section 7(b) of its agreement a compelling incentive for each of them to stay involved for a full five years, lest they sacrifice a portion of their vested equity.

40. We agree with Inland Empire and find nothing in its partnership agreement that undermines the *bona fides* of its proposed ownership structure; nor does it transgress the Commission's requirement that its "limited" partners not be able to influence or control its "general partners", who may be removed only for the aforementioned circumstances constituting good cause. *See Clarification on Ownership Attribution, supra*, 1 FCC Rcd at 803 (ability to remove "general" partner for good cause - *viz.*, "malfeasance, criminal conduct or wanton or willful neglect" - does not constitute undue control by "limited" partners). On the other hand, that selfsame *Attribution Clarification* order presents an obstacle which precludes our acceptance of this applicant's claim that several of its "limited" partners be considered mere passive investors. As was the case with Solano (*see supra* para. 23), six of Inland Empire's "limited" partners are members of the law firm that provided the basic legal advice for the partnership in which they here claim to be passive. *See I.D.*, para. 235. But, as we held with respect to Solano and quite recently in *Mark L. Wodlinger, supra*, the Commission's *Clarification on Ownership Attribution* order has declared, *ipso jure*, that a lawyer who furnishes personal services and expertise to an applicant in which the lawyer is a principal "is the antithesis of a passive investor."[40] Given what is, for all intents and purposes, a conclusive presumption that attorneys who furnish legal advice and services to applicants in which they themselves are principals are the "antithesis" of passive investors, we must - at a minimum - regard Inland Empire's local attorney, Pierce O'Donnell, an 18.24% equity holder, as an active applicant principal. As the ALJ reports at *I.D.*, para. 235, O'Donnell (along with his law partner, Jeffrey S. Gordon, a 12.16% principal of Inland Empire) has been actively involved in the preparation of this applicant's organizing agreements, and he cannot be considered a fully insulated financial investor who has not communicated with the "general" partners on key matters of substance. While the *I.D.* is unclear as to whether O'Donnell's other four law partner principals in Inland Empire also provided legal advice and service to the applicant, we observe that the combined equity holdings of O'Donnell and Gordon amount to more than 30% of Inland Empire's total equity,

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see id., para. 205, and that inasmuch as neither attorney intends to actually "integrate" into station management, it could not garner more than a 70% quantitative factor at best. If, as with Solano, we reduce that factor even further to reflect the equity interests of O'Donnell's four other law partner principals (whose interests he and Gordon presumably represented in working with the applicant's "general" partners), its quantitative "integration" factor would drop off even further. Since the Commission's "integration" analysis puts its highest premium on this quantitative factor, *see Horne Industries, Inc., supra* para. 7, and several of the other competing applicants here are entitled to a 100% quantitative factor, Inland Empire is out of the running (unless, as raised in note 40 of our margin, the Commission further clarifies its *Clarification on Ownership Attribution* in a manner that permits lawyer principals to be regarded as "passive"; the same holds true for Solano).

41. *TV 30.* Like several other applicants here, TV 30 is projected as a California corporation possessing two classes of shareholders: five of its shareholders are represented as holding only nonvoting stock while two others, Rumiko Naito and Howard Teruro, are said to hold respectively 80% and 20% of it's voting stock. *I.D.*, para. 237. Proposing to actually "integrate" only those two "voting" shareholders, TV 30 sought, of course, an extrapolated 100% quantitative "integration" factor. It ran afoul of the ALJ, who determined that inasmuch as four of the five members of TV 30's corporate Board of Directors (holding approximately 80% of its overall equity) were from the ranks of its "nonvoting" stockholders, its two sole "voting" shareholders did not possess full control of the corporation. Reasoning that these four TV 30 directors could not - at the same time - be considered mere "passive" investors, the ALJ held this applicant to be entitled to a 20% "integration" factor "at the very most." *Id.*, at para. 252. Before the Board, TV 30 argues that we should not consider its four directors to be "active" principals, or proportionately diminish its quantitative "integration" factor, because these four "nonvoting" shareholders will not actually (according to TV 30's exceptions) participate in the management of the company. In support of this facially paradoxical proposition, TV 30 brandishes a most imaginative syllogism: it posits (1) that "[t]he Commission [has] recognized the limited role of nonvoting stockholders in its recent *Ownership Attribution* "[41]; (2) and that four out of its five corporate directors are nonvoting stockholders which "precludes [them] the means to influence or control the activities of the issuing corporation"[42]: ergo, (3) its nonvoting shareholders cannot be considered "active" principals, despite their 80% majority on TV 30's Board of Directors.

42. Against the force of such potent syntactic polemics, we shall affirm the ALJ. As we have rehearsed in prior paragraphs, the Commission will generally refrain from attributing ownership interests to media principals who, by dint of their "passive" equity interests, will have "no material involvement" in the management or operation of the entity concerned. *Ownership Attribution, supra* note 6, 58 RR 2d at 618. Rather than attempting to explain just exactly how its four subject principals intend to constitute an 80% majority of TV 30's Board of Directors while simultaneously eschewing any "material involvement" in its management, TV 30's exceptions resort to the same keen powers of dialecticism reflected in the prior paragraph. To wit, its exceptions reference numerous cases in which individuals identifed as officers and directors of broadcast applicants were not accorded "integration" credit, notwithstanding their corporate offices. It urges: "The Commission has consistently held that officers and directors, who propose to work in a management capacity, but who own no stock, are not entitled to integration credit."[43] From that unremarkable principle, TV 30's exceptions go on to deduce:

> Thus, if the Commission is correct, as TV-30 submits it is, in holding that the interests of non-voting stockholders, and the interests of officers and directors are each not "cognizable" for integration purposes because each lacks the power to influence the operation and management of a corporation, the fact that a non-voting stockholder is also an officer and/or director cannot operate to raise the non-voting stockholder's interest to a "cognizable" interest. Even with the title of officer or director, a non-voting stockholder remains just that, a non-voting stockholder, with no power to control the company.

43. However, what TV 30 conveniently fails to iterate - but which the cases it cites do make clear - is that "integration" credit is tied directly to *equity ownership, see Policy Statement*, 1 FCC 2d at 395-396. Naturally, if a broadcast entity's officers or directors *own* no equity, they receive no *ownership* "integration" credit. But, that plainly is not the case with TV 30's four directors, who actually *own* 80% of its total equity, yet do not envision fulltime roles at the intended station. As a matter of general commercial law, corporate directors "direct or manage the corporation through officers." H.G. HENN & J.R. ALEXANDER, LAWS OF CORPORATIONS §203 (1983), and corporate directors "are required to use their best judgment and independent discretion, and are responsible for the determination and execution of corporate policy" as well as being charged with "supervision and vigilance for the welfare of the whole enterprise." *Id.*, at §207. *Cf. Letter to William S. Paley*, 61 RR 2d 413 (1986) (corporate Board of Directors hold control of corporation, notwithstanding substitution of C.E.O.). The law also applies in California. Cal. Corp. Code §300 (business and affairs of corporation are to be managed under direction of board of directors and all corporate powers exercised by, or under, direction of that board). It would be curious to most full-witted observers were we to hold in the face of these iron-clad legal obligations that TV 30's directors were mere "passive" investors in that same corporation.

44. Somewhat like A&R (*supra* paras. 19-20), TV 30's principals here seek to run with the hares and hunt with the hounds, never choosing one role over an *opposite* role. Whatever the intended purpose of its unfathomable ownership and management structure *on paper*, we find that the four "nonvoting" shareholders who occupy four-fifths of TV 30's directorship seats are, by fundamental operation of law, active equity principals of the TV 30 corporation. Since none of these four principals propose to devote their fulltime efforts to the station itself, the ALJ's award of a net 20% "integration" factor seems more than generous in view of the transcendent supervisory role of four of its (nonvoting shareholder) directors.

45. *All Nations.* The *I.D.* reports that All Nations is a nonprofit corporation governed by a five-person Board of Directors. Because nonprofit corporations have no "equity

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owners" in the sense that commercial entities do, our practice has been to calculate ownership "integration" credit for such organizations by constructively equating its governing directors with "owners" under the *Policy Statement*. *See generally Reginald A. Fessenden Educational Fund, supra*, 100 FCC 2d at 447, 451; *see also Farragut Television Corp.*, 5 FCC 2d 93, 97-99 (Rev. Bd. 1966). While All Nations had here proposed to "integrate" full-time four out of five of its directors into station management, the ALJ awarded it only a 40% quantitative factor, *I.D.*, para. 284, after faulting the "integration" proposals of two of its directors. More specifically, the ALJ rejected such credit for All Nations' directors Edward B. Bass and Oscar M. Canales after reviewing their testimony and opining that neither individual would hold true management functions at the station: rather, he considered that the roles they would fill would be advisory, not supervisory. *Id.*, paras. 281-283. Needless to say, All Nations' exceptions take umbrage at the ALJ's refusal to credit the "integration" proposals of Bass and Canales, and it claims, in essence, that the ALJ based his misimpressions on "inconsequential tidbits of testimony," whereas an objective reading of the larger hearing record would demonstrate that both individuals will perform managerial roles at its intended station.

46. The Board has closely reviewed the testimony of all of All Nations' principals and finds that, although much of the testimony of Bass and Canales was inexpert and at times suggested that they viewed their potential roles as essentially consultative rather than managerial,[44] other portions of the testimony of the All Nations' directors is consistent with functions generally considered managerial. Although this is a very close factual issue, where some deference is due to an ALJ's first-hand judgment,[45] we do not believe that the adverse inferences drawn from the testimony presented are supported by a preponderance of the record evidence as a whole. But, as we've acknowledged, it's *still* a close call. Moreover, we ourselves question whether it is proper to accept Bass' fulltime "integration" pledge in view of the fact Bass currently serves as Associate Pastor of a Los Angeles church, a position he does not intend to relinquish, notwithstanding his instant pledge to devote fulltime to the management of this new San Bernadino UHF television station. It is well-established that where fulltime "integration" is proposed, those having other substantial vocational commitments must make a persuasive showing as to how both occupations can be fulfilled at once.

> It is both a long-held and routinely-applied principle of our comparative broadcast law that persons seeking comparative credit for ownership integration must demonstrate on the record how they can accommodate their outside professional and business activities so as to fulfill their specific commitments to the proposed station. *Margaret Garza*, 1 FCC Rcd 1294 (Rev. Bd. 1986); *Central Texas Broadcasting Co., Ltd*, 90 FCC 2d 583, 596 (Rev. Bd. 1982), *rev. denied*, FCC 83-415 (Comm'n 1983), *aff'd mem. sub nom. Blake - Potash Corp. v. FCC*, No. 83-2112 (D.C. Cir. April 26, 1985); *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969).

Leininger - Geddes Partnership, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988). And, where a vocational conflict is apparent on its face, a loose promise to "diminish" the time devoted to a current occupation is too indefinite a vow to accept as satisfactory. *See id.*, 2 FCC Rcd at 3199 (practicing attorney's *ipse dixit* offer to devote to station "whatever time it takes" to qualify for fulltime "integration" credit found unacceptable). In this case, Bass' promise strikes us as equally vague. *See I. D.*, para. 270. However, the record on this matter is brief and inconclusive, and no opposing party has lodged exceptions directly on this point, thereby waiving any such objections to the ALJ's findings with respect to Bass' pastoral position (*see* 47 CFR §1.277(a)).[46]

47. As explained in the immediately previous footnote, All Nations' proposed 80% fulltime "integration" level places it comparatively below those with a 100% factor according to the Commission's *Horne Industries* formulation (*see supra* para. 7). Its hopes of prevailing lie, no doubt, in gaining a dispositive preference for its particular program format,[47] a matter we discuss *infra* at paras. 57-60 (along with a similar complaint by TV 30), after we conclude our review of the exceptions directed to "integration" matters. For present purposes, however, we concede All Nations an 80% quantitative "integration" factor, despite our own misgivings about the fulltime pledge of Edward Bass.

48. *RBN*. Like All Nations, above, RBN is reported to be a nonprofit corporation governed by a five person Board of Directors. Unlike All Nations, RBN sought a 100% fulltime "integration" credit for proposing that all five of its directors manage the intended station. But, the ALJ awarded RBN only an 80% factor after finding that one of its directors, Lorita F. Stewart, will have no supervisory duties in her proposed capacity as the station's Director of Public and Community Affairs. I.D., para. 312.

49. Whereas the ALJ placed great weight on Stewart's testimony "that she will not supervise any other person at the station" (*id.*, citing Tr. 455), there is a much more basic reason why Stewart is not entitled to management "integration" credit. The seminal *Policy Statement* under which we adjudicate clearly states that such credit is to be considered only where an "integrated" owner (or, as in this case, a director of a nonprofit entity) will be "exercising policy functions." 1 FCC 2d at 395 (emphasis added). Although represented by RBN as the station's intended Director of Public and Community Affairs, I.D. para. 302, Stewart at hearing testified as follows:

> Q. Ms. Stewart, could you explain to me what types of station policies you will determine as director of public and community affairs?
>
> A. I will determine no station policies, only -- I have a vote on the board of directors, come to a meeting and then and there I will get my vote.
>
> Q. But as director of public and community affairs, in that employee position you will not be setting any station policies?
>
> A. No, none at all.

Tr. 457. After reviewing the entirety of Stewart's testimony, we find that the ALJ's refusal to regard Stewart's function - at least as *Stewart* anticipates her function - as managerial or contemplative of significant policy-making authority or responsibility was clearly correct. No

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"integration" credit can be awarded to RBN for her presence, and it shall receive no more than an 80% fulltime award.

50. *Summary of Quantitative Integration Credit.* Based upon the foregoing review of the exceptions of all twelve remaining applicants, we have found that Sandino and SSP are entitled to a 100% quantitative fulltime integration factor, and Channel 30 a problematical 100% (*see infra* para. 54), after which come All Nations and RBN (with 80% at best), Inland Empire (with approximately 70% at best), and Buenavision (at 51% even if, *arguendo*, it is not dispatched as a complete sham). While we have declined to award Solano a specific quantitative "integration" factor, because its two "limited" partnership groups prominently include attorneys who have actively advised and serviced their applicant, and because its putative "general" partners seem to know very little of their application, Solano could not receive a grant here in any event without a remand for an evidentiary hearing to determine the basis on which its "general" partners certified their financial qualifications to the Commission (*see supra* para. 25). TV 30 receives, at most, a 20% factor. A&R has received no "integration" credit, because neither we nor its principals can determine their true ownership status, *viz.*, active or passive. And, finally, we affirm the ALJ's outright rejection of the "integration" proposals of SSB and Good News: these latter two are prototypical shams, in which an offstage conductor wields the baton, while stand-in performers fiddle with their borrowed instruments, forget the score (if they've ever perused it), and reduce the proceedings to burlesque.

51. Since, holds the Commission, "it is well established that qualitative attributes . . . may enhance the value of an integration proposal but cannot overcome clear quantitative differences." *Horne Industries, supra*, 98 FCC 2d at 604 n.12, we will turn our review to the qualitative attributes of those three applicants here held to be entitled to a 100% fulltime quantitative "integration" factor, Channel 30 (tentatively), Sandino, and SSP, none of whom are encumbered by any "diversification" (or signal coverage) demerit.

Comparison of Qualitative Attributes of Channel 30, Sandino, and SSP

52. *General Considerations.* Once competing parties are ranked on the "diversification" and quantitative "integration" criteria, and assuming no significant signal coverage differences, *see, e.g., Washoe Shoshone Broadcasting, supra*, our comparative analysis focuses upon the other attributes set out in the *Policy Statement*, and in even newer policy edicts, to determine whether any decisional distinctions exist as between the ranking applicants. Three qualitative *Policy Statement* attributes to be considered are (1) local residence in the community or proposed service area, with past local residence taking considerable precedence over recent or proposed future residence, 1 FCC 2d at 395-396 ; (2) civic activities in the community of license and, to a lesser degree, in the larger service area, *id.* ; and (3) broadcast experience, *Id.* More recently, the Commission also considers the racial and sexual make-up of an applicant, *see generally Cannon's Point Broadcasting, supra*. In that latter regard, the Commission has held that the comparative preference for a 100% fulltime "integrated" minority applicant is of approximately the same weight as that for local residence, *Radio Jonesboro*, 100 FCC 2d 941, 945 (1985), but that "minority ownership and participation has more significance as an enhancement factor than female ownership and participation." *Horne Industries*, 98 FCC 2d at 603. With that Commission value structure as our guide, we compare those applicants who are, in the Board's intermediate appellate view, entitled to the all-important 100% quantitative "integration" factor.

53. *Channel 30.* All four of Channel 30's proposed "integrated" principals are entitled to some local residence credit: Suzanne Schott, holding a 14.3% "voting" interest, is a long-time resident of the proposed station's service area, *I. D.*, para. 14, and its three other principals (each holding a 28.6% voting interest) are also long-time residents of the proposed service area. *Id.*, paras. 9, 19, 23. Further, all four were credited by the ALJ with civic activities in the service area, *see id.* at paras. 10, 15, 20, 24. One of its principals, Betty Johnson (a 10.9% equity holder) has some minor broadcast experience, *id.*, para. 25. All of its "voting" principals are female, *id.*, para. 7, and one, Lucy Lopez (a 10.9% equity holder) is Hispanic. *Id.*, para. 21.

54. Despite the fact that Channel 30 proposes to "integrate" all four of its "voting" shareholders, there remains a serious question as to whether it is entitled to a 100% *effective* "integration" factor. As indicated in paragraph 11, *supra*, one of Channel 30's four voting shareholders, Suzanne Schott, owns less than 1% of its total equity. And, as discussed briefly at paragraph 37 & n.37 with respect to another applicant (Good News), the Commission has for many years held that even "nonpassive" ownership interests of less than 1% are simply too insignificant to be legally cognizable as a media interest. Indeed, the Commission has recently raised that threshold cognizability level from 1% to 5%, *Ownership Attribution, see supra* nn. 6, 37, finding that ownership interests of less than 5% are so insubstantial that no individual (or entity) holding less than 5% level of a company's "nonpassive" equity could likely effect the management of a broadcast licensee. In fact, as we read the Commission's *Ownership Attribution* orders, ownership holdings of less than 5% need not even be reported to the Commission, the agency considering such holdings to be, in essence, *de minimis*. The question for us, then, is: can an individual receive ownership management "integration" credit while holding less than a legally cognizable level of ownership equity? Or, more specifically in the case at bar, should Schott receive full ownership "integration" credit, thus raising Channel 30's quantitative "integration" factor from 87.5% to a possibly dispositive 100%, when Schott herself owns but a mere 0.840% equity interest in her company? While we understand that Schott is depicted as holding 14.3% of the "voting" stock in Channel 30, it is not clear from the Commission's *Ownership Attribution* orders that this claim is determinative. From the Commission's orders themselves, it would appear that cognizability turns on the level of "nonpassive" equity, *simpliciter*, and not upon any free-floating voting arrangements. Accordingly, it is not clear that Channel 30 should receive an extrapolated 14.3% ownership management "integration" credit for Schott's 0.840% equity interest. We discuss the consequences of this enigma in our conclusions, *infra* para. 61.

55. *Sandino.* Jose Oti, Sandino's sole voting principal, has no significant past local residence, *see id.*, para. 38, nor (it follows) local civic activities to his credit, though his promise to move to San Bernardino should he be awarded the station is entitled to some relatively slight

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recognition under the *Policy Statement*. He has some broadcast experience, *id.*, para. 39, and is Hispanic, *Id.*, para. 40. Although Oti's racial preference outranks Channel 30's sexual preference, *Horne Industries*, and his broadcast experience is superior to Channel 30, it appears to us that Channel 30's past local residence and service area civic activities overbalance Oti's credentials by some palpable margin. Unless Channel 30's quantitative "integration" factor is reduced for the reasons discussed, Sandino would rank below Channel 30, all relevant comparative factors duly considered.

56. *SSP*. Having restored SSP to a 100% quantitative "integration" factor, our attention is upon Sandra Phillips, its sole "general" partner, the attributes of "limited" partners playing no part whatever in our comparative functions. Phillips has no past local residence (or, of course, local civic activities) on which to rely, *I.D.*, para. 171, and no past broadcast experience. *Id.*, para. 172. Like Oti, above, she promises, if selected, to move to San Bernardino. All told, however, given that the Commission officially prefers racial minorities to females as broadcast licensees, *Horne Industries*, SSP must be considered inferior to Sandino as an applicant.

PROGRAMMING ISSUES

57. TV-30 excepts to the ALJ's *Memorandum Opinion and Order*, FCC 84M-1466, released March 23, 1984, which denied TV-30's request for a "specialized programming" issue. TV-30 here asserts that, in its petition to enlarge issues, filed October 21, 1983, it made a substantial showing of a need for Asian-language programming in its proposed service area. Therein, TV-30 reflected the size of the Asian population within its contour (approximately 5% of the gross population), and it submitted a specialized programming proposal purporting to meet the needs of the Asian population. Nevertheless, based on TV-30's own admission that there is currently 50 hours a week of Asian programming available in the San Bernardino area, the ALJ concluded that no programming issue was justified.

58. In *George E. Cameron Jr. Communications*, 71 FCC 2d 460, 464-466 (1979)(subsequent history omitted), the Commission held that inquiry into the relative need for specialized programming under the standard comparative issue would be permitted only upon a threshold showing that the proposed format is not available in the particular market in a "substantial amount". *See also Comparative Broadcast Hearing Procedures*, 75 FCC 2d 721 (1980); *Wilshire District Broadcasting Co., Inc.*, 101 FCC 2d 908 (Rev. Bd. 1985). On its face, 50 hours of weekly programming directed at a 5% minority audience does appear "substantial" by Commission tenets. Thus, in *Flint Family Radio, Inc.*, 69 FCC 2d 38, 45 (Rev. Bd. 1977), a case cited with approval by the Commission in *Cameron* at n.6, as illustrative of the availability in the service area of a reasonable amount of the specialized religious format proposed by one applicant, other area stations were then broadcasting approximately 40 hours of such programming, and the Board declined to award a preference. More recently, in *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1098 (Rev. Bd. 1982), the Board concluded that 21 hours of a certain variety of specialized programming in the service area was ample to meet the Commission's "substantial amount" test and to defeat the request to add a specialized format issue. The Commission did not disturb this holding. *See Order*, FCC 83I-129, released November 9, 1983. Clearly, in light of this case precedent, TV-30's exception must fail.[48]

59. All Nations likewise excepts to the ALJ's *Memorandum Opinion and Order*, FCC 84M-1473, released March 23, 1984, wherein he also refused to add a comparative programming issue as requested in All Nations' petition to enlarge issues filed October 21, 1983. All Nations here asserts that it conducted ascertainment surveys of community leaders and the general public, and conducted a special survey of the Hispanic community, which constitutes 25% of the San Bernardino area population. Based on its ascertainment of the community's needs, All Nations submits it proposed specific programs to deal with the major needs in the area. Among other things, All Nations proposed to broadcast 32.1% of its programs in Spanish to address the problems ascertained in the Hispanic community. Moreover, citing *United Broadcasting Co.*, 59 FCC 2d 1412 (Rev. Bd. 1976), All Nations sought similar recognition of its proposed "short message format", and it here contends[49]:

> In *United Broadcasting Co.*, 59 FCC2d 1412, 37 RR2d 1169 (Rev.Bd. 1976), the Review Board added a comparative programming issue based on the form of the proposed programming. One important factor considered in the decision was the short message format proposed by the applicant. All Nations proposed to utilize the short message format to disseminate information in both English and Spanish regarding employment opportunities, crime prevention, youth, and senior citizen activities, services available to alcohol and drug abusers, and environmental and weather alerts. Proposal at 27-38.

60. We agree with the ALJ, albeit for somewhat different reasons, that a comparative programming issue is not warranted. Unlike TV-30, which sought a "specialized" programming issue, All Nations is here seeking what is commonly known as a "comparative" programming issue. The Commission's comparative programming issue has its genesis in the *Policy Statement*, 1 FCC 2d at 397, where the Commission, eschewing minor differences among applicants' proposed program plans, stated that it will accord decisional significance "only to material and substantial differences" and that such differences "will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service." In *Chapman Radio & Television Co.*, 7 FCC 2d 213, 214-215 (1967), the Commission required petitioners seeking comparative programming issues to make a *prima facie* showing of significant differences in proposed programming and to relate their claimed substantial superiority to ascertained needs. The *Chapman* standard is still good law. *See Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 189 (Rev. Bd. 1986); *Chase Communications Co.*, 100 FCC 2d 689, 691 n.6 (Rev. Bd. 1985). The persuasive threshold showing required by *Chapman* has not been met in this case. Although All Nations addressed one prong of the *Chapman* test by tying its program proposal to its ascertainment surveys,[50] it has not satisfied the second, more crucial prong of demonstrating that its program proposal is substantially and materially different from those of the other applicants and represents a superior devotion to public service. In other words, despite its conclusory claims of superiority, All

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Nations did not make a specific comparison between its programming proposal and those of the other applicants. Furthermore, while it claimed its programming was fashioned to meet the needs of the Hispanic community, other applicants also proposed significant Spanish programming. *See* Reply Exceptions of Channel 30 at 22; Reply of SBB at 4-5. In addition, the claimed superiority of All Nations' other programming categories is also open to questions. *See id.* (comparing All Nations' proposed news programming with that of TV-30's, and All Nations' proposed "all other" nonentertainment programming with that of Good News). Finally, insofar as All Nations' reliance on *United Broadcasting* emphasizes its "short message" format, the programming issue there turned on that petitioner's *prima facie* showing of significant differences in the *scheduling* of public affairs programming by the respective applicants. That is, petitioner was able to show that it would present the primary portion of its public affairs programming during hours when the listening audience would best be able to hear it, and that it would publicize said programming throughout the day, whereas, by contrast, half of the public affairs programs of its competitor would be presented between 3:00-4:00 a.m., and four of the latter's other public affairs programs would consist of brief two-minute vignettes. *See* 59 FCC 2d at 1422-1423. No comparable showing of significant scheduling differences between the applicants has been made by All Nations here. In sum, All Nations has not satisfied the Commission's intentionally stringent requirements for a comparative programming issue, and its exception is denied.

CONCLUSIONS

61. With none of the twelve competing applicants bearing the onus of a "diversification" demerit or, conversely, enjoying a dispositive signal coverage advantage, the *Policy Statement*, as amplified by subsequent Commission case precedent, enjoins our attention to ownership/management "integration", with a decisional emphasis first upon any "clear quantitative difference" as between the various applicants. Of all of the instant applicants, we have found that only Sandino and SSP are entitled to an unqualified 100% factor in that regard, which then brings us to the ALJ's recommended selection of Channel 30. Because of its wider array of qualitative "integration" enhancements (including, at varying levels, local residence and civic activities, minority and female ownership, broadcast experience (albeit slight)), Channel 30 would be a clear winner, if regarded as entitled to a 100% quantitative "integration" factor. However, as discussed at para. 54, *supra*, the question of whether to award any "integration" credit for Channel 30's Suzanne Schott, whose equity interest in the corporation is an infinitesimal 0.840%, and far below the Commission's current 5% threshold cognizability level for media interests, is not a matter of settled law. Though the Board itself would be strongly disinclined to award any ownership "integration" credit to a principal whose equity holding is deemed so insignificant by the Commission as to be neither cognizable nor even reportable as a media ownership interest *per se*, at least as we construe those *Ownership Attribution* orders, the Commission itself has not directly spoken to this unusual question. Hence, despite our own rhetorical questions, we will - if perhaps only tentatively - credit Channel 30 with Suzanne Schott's "integration" portion. Just as in *Independent Masters Ltd.*, *supra*, where thorny questions arose concerning the application of the Commission's newer *Ownership Attribution* policies to unforeseen situations arising in the comparative licensing context, we will heed the venerable maxim of cautious judicature, " *in dubio, pars mitior est sequenda.* " *See* 104 FCC 2d at 193. With a 100% quantitative "integration" factor, Channel 30's broader qualitative attributes, as we have said, sustain its present hold on first place. Were Channel 30's quantitative "integration" factor to drop off to the 85.7% level set by the ALJ, *I.D.*, para. 317, the contest between it and Sandino would be exceptionally close, perhaps too close to discern any meaningful distinction between the two.[51] In so stating, the Board recognizes that in *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd. 1981),[52] the Board opined that one applicant's 12.5% quantitative advantage in fulltime "integration" credit constituted the "clear quantitative difference" requisite to a decisional distinction. However, upon review of a subsequent case, the Commission "decline[d] to extend *New Continental* " to a Board decision in which it speculated that a 10.8% advantage was "probably" a clear quantitative difference. *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474, 1475 & n. 9 (1987). Thus, were we to reduce Channel 30 to an 85.7% quantitative factor and apply strictly the *New Continental* calibration, Sandino - with a 100% factor - would summarily prevail.[53] Inasmuch as the eleven competing applicants here rebuffed are entitled to file applications for full Commission review of our decision, 47 U.S.C. §155(c)(4), it is virtually certain that our treatment of Channel 30's "integration" element will be the subject of much appellate comment, and we are confident that the Commission will take any such occasion to specifically address the "nice" question which may ultimately divide Channel 30 from the permanent possession of the television Construction Permit we hereinbelow award to it.

62. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed November 2, 1987, January 6 and April 29, 1988, by Solano Broadcasting Limited ARE GRANTED, and the amendments ARE ACCEPTED; that the petitions for leave to amend filed December 23, 1987 and June 8, 1988, and the motion for leave to amend filed February 5, 1988 by Sandino Telecasters ARE GRANTED, and the amendments ARE ACCEPTED; that the petition for leave to amend filed February 12, 1988 by Channel 30, Inc. IS GRANTED, and the amendment IS ACCEPTED; that the motion to strike filed December 17, 1987 by Solano Broadcasting Limited IS DENIED; and that the petition for leave to file, filed April 21, 1988 by Good News Broadcasting Network, IS GRANTED; and

63. IT IS FURTHER ORDERED, That the Application of Channel 30, Inc. (File No. BPCT-830506LS) for authority to construct a new television station on Channel 30 at San Bernardino, California IS GRANTED; and that the applications of Religious Broadcasting Network (File No. BPCT-830505KV), Solano Broadcasting Limited (File No. BPCT-830506KK), A&R Broadcasting Company, A Limited Partnership (File No. BPCT-830506KM), Buenavision Broadcasters (File No. BPCT-830506KN), SSP Broadcasting, A Limited Partnership (File No. BPCT-830506KO), Good News Broadcasting Network (File No. BPCT-830506KR), Sandino Telecasters (File No. BPCT-830506KT), Inland Empire Television (File No. BPCT-830506KU), Television 30, Inc. (File No. BPCT-830506KV), San Bernardino Broadcasting, Limited Part-

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nership (File No. BPCT-830506KX). All Nations Christian Broadcsting, Inc. (File No. BPCT-830506LA) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] *See Order*, FCC 83M-4753, released December 19, 1983; *Order*, FCC 83M-4754, released December 19, 1983; *Order*, FCC 83M-4755, released December 19, 1983; *Order*, FCC 84M-1962, released April 25, 1984; *Order*, FCC 84M-2252, released May 11, 1984; *Order*, FCC 84M-2405, released May 22, 1984; *Order*, FCC 84M-2535, released June 1, 1984; *Order*, FCC 84M-3484, released August 10, 1984; *Order*, FCC 84M-4235, released October 2, 1984.

[2] The *Policy Statement's* tilt toward those applicants with no other mass media holdings is evidenced not only by its heavy emphasis on the basic "diversification" criterion, but under the "integration" criterion as well. Thus, the *Policy Statement* declares that it favors the "integration" of ownership into active station management not only on its own merits, but because placing a comparative premium on fulltime management participation by licensee principals in one case "frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership." 1 FCC 2d at 395.

[3] *See Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 794 (Rev. Bd. 1984), *aff'd in principal part sub nom. Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1986)(Comm'n), *aff'd per judgment sub nom. Plantation Broadcasting Corp. v. FCC*, 812 F.2d 1443 (D.C. Cir. 1987). There the Board relieved one of the applicants of a comparative "diversification" demerit for ownership of a nearby cable television system, because that applicant held such interests for less than one month in the midst of the comparative hearing.

[4] However, as we suggested some time ago in *Santee Cooper Broadcasting Co., supra* note 3, the existing FCC policy of according very little relative weight to cable television system co-ownership relative to co-ownership of other mass media outlets is becoming increasingly untenable, both factually and legally. In *Santee Cooper*, we observed:

> As we have repeated from *Greater Wichita, supra*, CATV systems are of lesser concern than broadcast stations from the standpoint of media "voices." Yet, with the growth of such phenomena as the Cable News Network, for example, cable is clearly moving away from its origins as a passive carrier of distant TV signals and becoming more of a media "voice" in its own right. *See e. g., Children's Television Programming*, 55 RR 2d 199, 208 (1984); *Fairness Doctrine Inquiry*, 49 Fed. Reg. 20317, published May 14, 1984, at paras. 26-44.

99 FCC 2d at 794 n.54. Other factual, legal, and policy developments since *Santee Cooper* reinforce our view that, for example, counting one competing applicant's ownership of one (or more) distant television (or even radio) broadcast station(s) more heavily against it than a competing applicant's co-owned cable television system(s) under the rubric of media "diversification" is patently anachronistic. For instance, in considering television station transmitter relocations, the Commission has recently indicated, albeit indirectly, that it now regards a local cable television system as virtually a fully acceptable substitute for an existing local television station. *See KTVO, Inc.*, 57 RR 2d 648, 650 (1984)(Comm'n) ("In recent years it has become apparent that for some purposes the public interest is best served by treating [TV, CATV, Translators] as a single video marketplace.") More recently, the court discoursed upon the Commission's updated view of cable television's status as a very significant mass medium in its own right.

> Abandoning its initial view of cable as an auxiliary service that merely supplemented broadcasting by improving reception in outlying areas, the Commission now recognized cable as a legitimate, independent vehicle for providing alternative video services to the public.

Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1442 (D.C. Cir. 1985), *cert. denied sub nom. Nat'l Ass'n of B'casters v. Quincy Cable TV, Inc.*, 106 S. Ct. 2889 (1986). Under these changed circumstances, where cable television is now regarded by official observers as an *independent* mass medium of expression, so much so as to be entitled to rather exacting First Amendment protections (*Quincy*), and a mature video media service that may now be permitted to wholly supplant an existing local television signal (*KTVO*), the Board firmly believes that *Greater Wichita Telecasting, supra*, must be revisited and reconciled with the agency's radically altered perception of the status of cable television in the contemporary mass media universe. Cable television should play no less a role in the Commission's "diversification" considerations than any other mass medium.

[5] The deadline after which an applicant cannot make a cognizable media divestiture pledge is the so-called "B" cut-off date. "The 'B' cut-off date is the last date for filing minor amendments by all mutually exclusive applications subsequently filed as of the 'A' cut-off date." *Clay Television, Inc.*, FCC 88-95, released March 16, 1988, at para. 2, 3 FCC Rcd 1590. For an illustration of this avoidance mechanism applied in practice, *see WHW Enterprises, Inc.*, 89 FCC 2d 799, 813-814 (Rev. Bd. 1982)(subsequent history omitted).

[6] In not attributing - for routine comparative purposes - the extant media holdings of an applicant's "nonvoting" shareholders or, as the case may be, an applicant's "limited" partners, the Board generally tracks the Commission's rules and policies regarding such "passive" ownership interests as set forth in *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *reconsidered*, 58 RR 2d 604 (1985), *further clarified*, 1 FCC Rcd 802 (1986). *See Daytona Broadcasting Co., Inc.*, FCC 86-182, released April 18, 1986, at para. 7 (*Attribution of Ownership* policies applicable in comparative "diversification" calculations).

[7] Several other directors of RBN are also affiliated with Cathedral of Faith and are engaged in the production and sale of its programming to San Jose area cable television systems. *I. D.*, para. 314. However, their roles in this regard are not so significant that any measurable "diversification" onus would attach to RBN. Conversely, the role of Reverend Foreman, in both the Cathedral of Faith programming and in the proposed San Bernardino station, is dominant and does present certain "diversification" questions.

[8] In *Morris, Pierce & Pierce*, the Board declined to assess a "diversification" demerit to an applicant, one of whose principals (and 25% equity holder) owned a majority interest in a radio production company. 88 FCC 2d at 723. No evidence appeared in that case to suggest that the goal of media diversity in the Fort

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Myers Beach, Florida area would be impacted because of that particular production company interest. *See also Pittsfield Community Television Ass'n*, 94 FCC 2d 1320, 1321-1322 (Rev. Bd. 1983)(no "diversification" demerit assessed based upon advertising agency interest or individual's mere employment with a large national network in program production capacity).

[9] Exceptions have been taken to the ALJ's acceptance of RBN's March 11, 1987 amendment, to the extent that Reverend Foreman's pledge therein to resign his Cathedral of Faith offices came more than 30 days after Cathedral of Faith (on February 2, 1987) agreed to purchase outright Channel 65.

[10] For example, in a recent case the Court of Appeals dismissed an appeal of a Commission decision because the appellant failed by one day to meet a pleading deadline. *Punta Ybel Communications, Ltd. v. FCC*, No. 86-1670 (D.C. Cir. February 29, 1988). *See also Channel One Systems, Inc. v. FCC*, No. 88- 1100 (D.C. Cir., June 14, 1988). However, the deadline missed in *Punta Ybel* was a *statutory* deadline (47 U.S.C. §402(c)), and the comparative "divestiture" deadline at issue in the case at hand is purely internal.

[11] RBN Exceptions at 5.

[12] Indeed, the ALJ determined that the Channel 65 programming contract was not a cognizable media interest. While we disagree with that judgment, we have in the text recognized the possible ambiguity surrounding such program production activities in the context of the Commission's "diversification" considerations.

[13] Nor may we exact a comparative penalty from RBN under Section 1.65, since there is no suggestion here of an intent to conceal decisional facts from the Commission or a pattern of carelessness or inattentiveness to the Commission's reporting requirements. *See Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23, 24-25 (1983), *modified on reconsideration*, FCC 84-496, released October 23, 1984.

[14] Buenavision Exceptions at 28-32.

[15] Remarks by Dennis R. Patrick, Chairman of the Federal Communications Commission, before the National Association of Broadcasters, April 12, 1988, Las Vegas, Nevada. In that same speech, Chairman Patrick vowed to "move aggressively against those who set up 'sham' ownership structures to take advantage of various comparative preferences."

[16] For further insights into this unfortunate phenonemon, *see, e.g., Newton Television, Ltd.*, 3 FCC Rcd 553, 558-559 n.2 (Rev. Bd. 1988). *See also* Tillotson, *FCC's Comparative Process Is A Sham and A Shamble*, BROADCASTING, Oct. 5, 1987, at 22; Barnes, *Investors Use Blacks As Fronts To Obtain Broadcasting Licenses*, Wall St. J., Dec. 11, 1987, at 1, col. 1. As we noted in *Newton Television*, the foremost victims of these sham applicants are *bona fide* minority (and female) applicants who must compete against these well-heeled poseurs in very expensive comparative licensing proceedings for the relatively few broadcast frequencies remaining unoccupied.

[17] The evidence (Tr. 2175) reveals that Ms. Schott's husband had transferred the Channel 30 stock to her because his ill health would have prevented his active participation in corporate affairs and, later, at the proposed station. It is now reported that Mr. Schott has since passed away. Channel 30 Exceptions at 10 n.5.

[18] Sandino asserts that although Frankie Crocker had fully joined in the May 14, 1984 "Joint Petition" signalling the merger and the simultaneous withdrawal of Crocker's own application, Crocker later refused to sign the new limited partnership agreement, despite the proddings of Oti, Riklis and Sandino counsel. *See* Sandino Exceptions at 7-11. Sandino's exceptions contend, without challenge by the other parties, that Crocker obstinately refused to sign the partnership agreement because of a disagreement between him and Riklis over past legal expenses; and, thereafter, Crocker spurned all of Sandino's attempts to communicate with him. Finally, claims Sandino, Oti and Riklis "had no choice but to exclude [Crocker] from Sandino." *Id.*, at 10. Consequently, Oti and Riklis sought to amend the Sandino application to specify Oti as the sole "general" partner (and 30% equity owner) and Riklis as the sole "limited" partner (owning the remaining 70% of the equity).

[19] Actually, in *Anax*, the applicant had represented that 71% of its equity was held by "additional limited partners." 87 FCC 2d at 484.

[20] *See Attribution of Ownership Interests (supra* note 6), 1 FCC Rcd at 804.

[21] Because we affirm the ALJ's conclusion that SBB's application is essentially a sham, we need not determine whether a principal holding a mere 10% equity interest in an applicant can - without additional evidentiary factors - claim to exercise exclusive control over that applicant's activities. This matter is discussed at greater length in *Independent Masters, Ltd.*, 104 FCC 2d 178, 190-193 (Rev. Bd. 1986), a case recently settled without Commission resolution of the issue. *See* FCC 88I-046, released May 25, 1988.

[22] A&R Exceptions at 6 (quoting *Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 989 (1984)).

[23] Additionally, inasmuch as we have affirmed the ALJ's conclusion that Charles E. Walker's role is active rather than passive, A&R - with only a 73% quantitative integration factor - is effectively out of contention with those applicants who propose to "integrate" all of their owners. *See infra*, para. 51.

[24] Solano Exceptions at vi.

[25] *Id.*, at 3.

[26] In fact, a number of Solano's "limited" partners also hold a variety of other media interests, see I.D. paras. 86-92, but it appears that all of Solano's principals have made a timely pledge to divest those other media interests should Solano prevail in this proceeding. The ALJ, therefore, assessed Solano no "diversification" demerit; nor shall we.

[27] The Board recognizes, with appropriate empathy, *see e.g., Independent Masters, supra* note 21, 104 FCC 2d at 189 n. 25; *Chester Associates*, 2 FCC Rcd 2029, 2031 n.9 (Rev. Bd. 1987), that many of the activities of attorneys Parker and Rosenbloom on behalf of Solano and the respective principals of C30-I and C30-II occurred prior to the Commission's 1986 Ownership Attribution clarification, wherein the Commission first discussed with specifity the role of equity-holding attorneys. However, we held in Wodlinger that the Commission's clarification language, and the underlying reasoning, precluded the Board from any different result with respect to entities formed prior to that clarification. We also note that, in the instant case, Rosenbloom at least has continued his advisory and representational activities to this very day, *see, e.g.*, Tr. of Oral Arg. of April 1, 1988 at 4011-4031, despite the potential implications of the Commission's 1986 Ownership Attribution clarification order. As Rosenbloom himself stated at oral argument:

> MR. ROSENBLOOM: There are two lawyers involved in the Solano matter. One is Mr. Parker in Texas and one is myself.
>
> I am before you. I have participated in the prosecution of this case from the moment the case was filed. I've advised on legal matters before the Commission; and I am not a potted plant.

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Id., at 4013. A blooming rose, perhaps, but definitely neither green in FCC matters, nor potted in any respect.

[28] A good example of such certification foolishness is to be found in the aforecited *Washoe Shoshone Broadcasting*, FCC 88R-30 at paras. 44-52.

[29] Buenavision Exceptions at 7-21.

[30] Revision of Form 301, 50 RR 2d 381 (1981).

[31] The Board notes that in *Victory Media*, *supra*, the Commission reversed the Board's refusal to recognize a purported corporate applicant which did not file its state certificate of incorporation until the "B" cut-off date, had issued no stock, had no by-laws, and whose certificate of incorporation specified only one class of stock (voting), whereas the applicant predicated its quest for an effective 100% quantitative "integration" factor on its parolclaim that it had two classes of stock (voting and nonvoting). See 3 FCC Rcd at 2074-2075. In that case, the Commission stated that the applicant's "informality" was not significant. Id. However, the Board does not read *Victory Media* so broadly as to suggest that the Commission is satisfied for its required regulatory purposes to rely upon "oral" corporations, "oral" partnerships, or an applicant's claim that it will adopt its actual legal form and substance at some unspecified time in the future. That, of course, would be absolutely absurd, and we must believe that *Victory Media* turned on the particular facts of that case.

[32] SSP Exceptions at 6-7. Indeed, it was not until the Commission issued its 1984 Ownership Attribution, supra note 6, that the Commission expressly announced that it would rely upon, for its own purposes, the Uniform Limited Partnership Act to ensure that "limited" partners were adequately insulated from control of a broadcast entity. *See* 97 FCC 2d at 1022-1023. Shortly thereafter, and upon reconsideration (in 1985), the Commission abandoned its intended reliance on the ULPA, and indicated that it would demand far more stringent contractual provisions in limited partnership agreements. Ownership Attribution, supra note 6, 58 RR 2d 615-620. The SSP limited partnership agreement does not contain the express contractual provisions set forth in the Commission's 1985 reconsideration order (and, more specifically, paras. 48-50 thereof).

[33] SSP Exceptions at 14.

[34] *See, e.g.*, Good News' Exceptions at 6.

[35] *Id.*, at 6-7.

[36] *Id.* As discussed supra, para. 31, the Board recognizes that the Commission has of late deemphasized financial dominance as a key test of defacto control. However, neither the Commission nor the Board completely ignore the financial relationships between an applicant's principals, *see, e.g., KIST Corp.* and *Pacific Television*, especially where collateral evidence suggests that a particular principal is more than a "passive" financier. Financial dominance remains one link in the chain of evidence that can lead to a determination that an applicant's so-called "active" principals are actually subordinate.

[37] In its *Ownership Attribution* report, the Commission held that its prior 1% attribution benchmark was too low, and it declared that - in general - any ownership interest below 5% for "Non Passive Investors" is simply too insignificant to effect control of a broadcast entity, even in "closely-held" companies. *See* 97 FCC 2d at 999-1012. Indeed, individual equity interests of less than 5% need not even be reported to the Commission as a palpable broadcast ownership interest. Id., at 1028. Here, Good News' three "non-passive investors" each own less than 5% of their entity's total equity.

[38] By inadvertence, the I.D. denominates two of its paragraphs as number 235. We will refer to the second of these as "235(a)."

[39] Inland Empire Exceptions at 19-20 (citing Section 12(a) of its partnership agreement).

[40] Citing *Louisiana Super Communications Ltd. Partnership*, 102 FCC 2d 1293, 1297-1300 (Rev. Bd. 1985), the ALJ did not regard the legal activities and services of Inland Empire's "limited" partners as negating their claims of passivity. I.D., para. 235. However, *Louisiana Super* was decided nearly one year prior to the Commission's issuance of its *Clarification on Ownership Attribution*, and is, of course, superceded thereby. The Board concedes, moreover, that it may have improvidently failed to expressly apply the Commission's conclusive presumption with respect to lawyer principals in other cases decided both before and after the Commission issued its *Clarification*. *See, e.g., Victory Media, Inc., supra*, 2 FCC Rcd at 1760-1761, remanded, FCC 88-134, released April 12, 1988; *Tulsa Broadcast Group, supra*, 2 FCC Rcd 6129-6130. To the extent that these or other cases are inconsistent with the Commission's 1986 Clarification order with respect to attorney principals, we are confident that any such errors will be corrected upon proper review. Or, as the case may be, the Commission may take the opportunity to further clarify its position on this increasingly prevalent issue in adjudicatory cases.

[41] TV 30 Exceptions at 6.

[42] *Id.*

[43] *Id.* at 7-8.

[44] A perfect "tidbit" of such testimony is found in All Nations' own exceptions: it reproduces the following record exchange with F. Patrick Pearce, Jr., its intended station's operations manager:

> Q. Would Mr. Bass in his capacity as Coordinator of Black Programming, would he be responsible for producing specific public affairs programming?
>
> A. Yes, I think he would certainly help in that area.

All Nations Exceptions at 20. Pearce also testified that, in Canales' role as coordinator of Hispanic programming, Canales would have only a "very strong role in the selection of Spanish language programming." Id. (quoting Tr. 1770).

[45] Technically speaking, it is to an ALJ's "credibility" findings to which both the Board and Commission show considerable obeisance. *TeleStar, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987), aff'd, FCC 88-171, released May 19, 1988, and the ALJ did not here find any of All Nations' witnesses to be lacking in credibility. Indeed, the ALJ accepted as true the testimony offered, but drew adverse inferences therefrom. *See I.D.*, paras. 281-283.

[46] The reticence of the exceptors on this matter may be explained by the fact that, at best, All Nations seeks only an 80% fulltime "integration" factor, and may therefore not have been viewed as a comparative threat to those receiving or seeking a 100% corresponding factor.

[47] All Nations Exceptions at 24-31.

[48] We also reject TV-30's claim that, because of licensee discretion, the amount of Asian-language programming now available "could disappear". This contention is speculative; and - by TV 30's standard - no current amount of specialized programming could ever be deemed "substantial." Ironically, there is no greater guarantee that TV-30 would continue its proposed specialized format, which is why the Commission is very reluctant to base its comparative preferences on programming differences as a general rule. For a fuller discussion, *see Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 689-691 (Rev. Bd. 1980)(referencing the procedural *cordon sanitaire of* the threshold showing).

[49] All Nations Exceptions at 29.

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[50] We depart from the ALJ's analysis in this regard, and observe that although the Commission abolished its formal ascertainment requirements, it retained the "obligation on the part of each station to offer programming responsive to community issues." *Deregulation of Radio*, 87 FCC 2d 797, 804 (1981), quoted in *Wilshire District Broadcasting*, *supra*, 101 FCC 2d at 910.

[51] The Commission has anticipated that, in occasional comparative licensing cases, there might be no meaningful differences between two (or more) competing applicants; and that in such cases a "tie-breaker" lottery would ensue. *Lottery Selection Among Certain Applicants*, 57 RR 2d 427, 430-432 (1984). Judicial review of the Commission's "tie-breaker" lottery policy was declined on ripeness grounds, *National Latino Media Coalition* v. *FCC*, 816 F.2d 785 (1987), because the Commission had not yet (and might never) confront an actual tie. Consequently, the "tie-breaker" lottery is theoretically available, albeit judicially unreviewed.

[52] *Remanded on other grounds*, 93 FCC 2d 1275 (1983).

[53] In retrospect, and considering the criticism that has attended *New Continental's* decisional emphasis on a factor so objectively questionable, *see supra* para. 7, it is the opinion author's view that the Commission may wish to review this matter with an eye toward deemphasizing minor "integration" percentage differences and turning sooner to the qualitative differences in applicants integrating more than a majority of their ownership.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

MT. BAKER BROADCASTING
CO., INC.

For Reinstatement of Construction Permit of
Station KORC(TV), Anacortes, Washington

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 1988; Released: August 5, 1988

By the Commission:

1. The Commission has before it for consideration: (a) the June 23, 1987, action of the Chief, Video Services Division, cancelling the construction permit of Mt. Baker Broadcasting Co., Inc. (Mt. Baker) for Station KORC(TV), Channel 24, Anacortes, Washington, and deleting the call sign; (b) the staff's January 25, 1988, action denying reconsideration of that action; and (c) Mt. Baker's February 25, 1988, application for review of those actions.

2. On July 1, 1983, the Commission issued Mt. Baker a construction permit to build a new television station on the channel, and it was initially afforded until January 1, 1985, in which to complete construction. With the grant of three applications for extensions of time, Mt. Baker's construction period was extended until July 1, 1986. Those applications were granted in light of the standards in effect at that time for reviewing extension applications, and on the basis of the permittee's representations that construction was proceeding, including statements that equipment had been ordered, that the tower and transmitter building would be completed by August 1985, and that the station would begin operation in October 1985. Despite its previous representations, the station was still not operational by July 1, 1986, and Mt. Baker filed its fourth extension request. The staff found, however, that, after 3 1/2 years, Mt. Baker had still not shown that any equipment had been delivered, that the tower and transmitter building had been erected, or that the studio facilities had been completed. Consequently, the staff was unable to conclude that the station could be completed by an estimated "on air" date of December 31, 1986. Therefore, on December 5, 1986, Mt. Baker's extension application was denied, and its construction permit was cancelled.

3. On December 31, 1986, the permittee sought reconsideration of the staff's December 5 action, arguing that the station was "commencing program tests with its facility" as of that date. Mt. Baker therefore requested reinstatement of its permit to enable it to apply for its "license to cover completed facilities. In a supplement, Mt. Baker added that its tower and transmitting equipment had been installed during December 1986 and that equipment tests had begun on December 24. On the basis of Mt. Baker's representations, the staff reinstated the construction permit on January 12, 1987, on the condition that a license application be filed within ten days, in accordance with the Commission's Rules.[1] At the same time, the staff set a new expiration date for the reinstated construction permit of January 30, 1987.

4. By April 28, 1987, however, a license application had still not been filed. On that date, the Commission's Field Operations Bureau conducted an inspection of the station, which revealed that the station had been constructed and was being operated with substantially different facilities than those authorized. Specifically, the construction permit authorized an Andrew 33H 7 10/A21138 antenna installed on a tower 403 feet above ground level (AGL) with operation at 3630 kW visual effective radiated power (ERP). In contrast, the inspection showed that Mt. Baker had built a tower 100 feet AGL on which it installed a Scala SL-8 paraslot antenna. Further, the station was found to be operating at 10.3 kW ERP, using a transmitter specified to produce peak output power of only 1000 watts (1 kW). The facilities built are equivalent to those used by many television translator or low power television stations. Because Mt. Baker's construction permit had expired with no license application having been filed, the staff concluded that Mt. Baker was operating without authority and, on June 23, 1987, cancelled the construction permit and ordered Mt. Baker to cease operations by June 29. Mt. Baker's petition for reconsideration of that action followed on October 27, 1987.

5. In support of its petition for reconsideration, Mt. Baker admitted that the station had been built with facilities other than those authorized, but argued that the staff should consider its service record and good faith efforts to build. Specifically, the permittee stated that it had attempted to correct the operating violations identified during the Field Operations Bureau inspection. Mt. Baker also asserted that, on May 6, 1987, it had filed an application to modify its construction permit to reflect facilities already constructed, although there is no record that any such application has been filed. The staff found that, in Mt. Baker's December 31, 1986, request for reinstatement of its construction permit, the permittee represented that construction had been completed and that program tests had been commenced. There was no indication, however, that construction and operation were other than that authorized. Consequently, the staff found that Mt. Baker's construction permit was reinstated on the incorrect assumptions that the station had been built with authorized facilities and that the filing of a license application for those facilities was imminent. When the inspection of the station revealed that this was not the case, and when Mt. Baker failed to file a license application as it had been ordered to do (and also failed to seek a further extension), the staff cancelled the permit and ordered the station off the air. The staff also determined that good faith had not been shown, or the station would have been built as authorized. Consequently, on January 25, 1988, Mt. Baker's petition for reconsideration was denied, and its application for review followed on February 25, 1988.

6. In support of its application for review, Mt. Baker argues that a forfeiture is the appropriate sanction for unauthorized construction, not cancellation of the construction permit. It also reiterates its contention that it has made a substantial commitment of resources to the project and that it has provided a first local television service to Anacortes. Finally, it asserts that no other applicant will be allowed to apply for the channel (because of the community's proximity to Seattle) until the "freeze" on certain applications for new television stations is lifted.[2]

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7. Section 73.3598(a) of the Commission's Rules provides a permittee with 24 months to complete construction of a new television station and to file a license application. In addition, a permittee may seek extensions of time of up to six months, upon a showing of one of the following three circumstances: (1) completion of construction with testing underway; (2) substantial progress in construction; or (3) reasons clearly beyond the permittee's control that prevented construction, if all possible steps have, nevertheless, been taken to resolve the problem and proceed with construction. Section 73.1620(a) provides that, "upon completion of construction *in accordance with the terms of the construction permit* " [emphasis added], the permittee can conduct program tests, provided that a license application is filed within ten days. Mt. Baker has not established that it was prevented from constructing its authorized facilities because of reasons beyond its control. When the staff reinstated Mt. Baker's construction permit on January 12, 1987, it did so based only on the reasonable belief that the station had been constructed as authorized and that the filing of the license application was imminent. Although Mt. Baker argues that it has spent more than 600,000 in construction and operation of the station, such expenditures have not been documented. Moreover, Mt. Baker has not shown that the money was spent on constructing authorized facilities, and the amount used for operating expenses has no bearing on the progress made in construction. In any event, the alleged expenditure of funds for constructing facilities that differ so substantially from the authorized facilities provides no persuasive basis for acting favorably on Mt. Baker's application for review.

8. Mt. Baker contends that the imposition of a forfeiture is often the penalty for unauthorized construction of a broadcast station. forfeiture might be appropriate in some cases where construction differs by a modest degree from the facilities authorized. The departure in this case is clearly not modest; for example, operation with 10.3 kW ERP, compared to 3630 kW authorized. In addition, there are no significant mitigating circumstances in this case, but there are substantial aggravating factors. In that regard, improper construction did not occur through error or inadvertence; the facts clearly indicate an effort to deceive the Commission. A license application would have revealed what had been built and would, almost certainly, have been denied, but Mt. Baker did not file one, and the deception was not uncovered until the Field Operations Bureau inspection. Even then, Mt. Baker took no steps toward remedying the situation. It could have sought authority to modify its facilities before undertaking construction, but no such application was filed.[3] It could have filed an application for additional time to build after January 30, 1987; it did not. Finally, it was ordered to file a license application within ten days of beginning operation; again, it did not. For all these reasons, we conclude that a forfeiture is inappropriate in this case. Moreover, such action comports with Section 319(b) of the Communications Act of 1934, as amended, which provides that a construction permit will be "forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow."

9. Finally, we reject Mt. Baker's argument that the "freeze" will preclude others from providing service to Anacortes on the channel. The "freeze" is temporary and, in any event, it can be waived in an appropriate case. *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, Mimeo No. 4074, RM-5811 (released July 17, 1987). Consequently, we find no basis to disturb the staff's actions in this matter.

10. Accordingly, IT IS ORDERED, That Mt. Baker's application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Section 73.1620(a)(1) of the Commission's Rules provides that a television station may begin program tests upon notification of the Commission, provided that a license application is filed within ten days.

[2] On July 16, 1987, we adopted an Order in the Rule Making proceeding entitled *Advanced Television Systems and Their Impact on* the Existing Television Broadcast Service, Mimeo No. 4074, RM-5811 (released July 17, 1987). In that Order, we imposed a "freeze" on the acceptance for filing of applications for new television stations in cities within the minimum co-channel separation distance of 30 specific cities, one of which is Seattle, Washington, which is approximately 59 miles from Anacortes.

[3] Mt. Baker also states that, on May 6, 1987, it filed a modification application specifying the facilities it had already constructed. Although it maintains that the application was filed with the appropriate fee, there is no record in our Fee Section or anywhere else in the Commission of any such application being filed.

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UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

In re Applications of	:	
READING BROADCASTING, INCORPORATED,	:	MM Docket No. 99-153
	:	File No. BRCT-94047KF
	:	File No. BPCT-940630KG
ADAMS COMMUNICATIONS CORPORATION.	:	

Washington, D.C.

Monday, April 3, 2000

Deposition of

R. CLARK WADLOW

a witness, called for examination by counsel for Adams Communications Corporation (ACC) pursuant to notice and agreement of counsel, beginning at approximately 1:40 p.m. at the law offices of Sidley & Austin, 1722 I Street, N.W., Washington, D.C., before Bonita A. Warmowski of Beta Reporting & Videography Services, notary public in and for the District of Columbia, when were present on behalf of the respective parties:

Q Could you please summarize briefly your professional background starting with law school?

A I graduated from Harvard Law School in 1971 with a JD. I then moved to Anchorage, Alaska, where I was a law clerk to the Chief Justice of the Alaska Supreme Court from July of '71 until August or September of '72.

December 1 of '72 I became an associate at Hogan & Hartson and stayed there until 1980. I moved to Schnader Harrison Segal & Lewis here in Washington, a Philadelphia firm but a Washington office. I was there until 1990.

April 1, 1990, I moved to Sidley & Austin and have been there ever since.

Q Did you celebrate over the weekend?

A Yes, April Fool's Day.

Q Over and above your private practice you have been involved in bar association activities; am I correct about

that?

A That is correct.

Q Could you briefly state the highlights of that?

A Early in my professional career I became active in the D.C. bar young lawyers and the ABA young lawyers. From roughly '78 to '81 I served a three-year term on the ABA board of governors as a member at large.

I served in the ABA house of delegates. I chaired several ABA Committees in several different sections and in the ABA at large. I've been active in the federal communications bar association throughout most of my career. I guess that's a rough summary.

Q You were president of the federal communications bar associations?

A Yes, I was. Two or three years ago I was president of the FCBA.

Q The rumor I hear, and I'd appreciate it if you could confirm this, is

cable, a lot of telephone, satellites. I've probably done everything from the garage door openers to microwave ovens to satellite systems, everything that the FCC regulates.

Q Now, I want to focus initially on your relationship with an individual named Michael Parker.

During the course of your professional experience, have you had occasion to represent a Michael Parker or any businesses in which Mr. Parker was a principal?

A Yes.

Q For the purposes of this deposition, when I use the term "principal," I'm referring to officer, director or shareholder.

A Okay.

Q Do we understand that? When did you first encounter Mr. Parker in your professional practice?

MR. GEOLOT: You're referring to

representing him?

MR. COLE: No. Just encountering him.

THE WITNESS: I believe it would have been in the early to mid-1980s, maybe '83.

BY MR. COLE:

Q Do you recall the first time that you represented Mr. Parker?

A It would have been the same time.

Q Do you recall the context in which you represented him?

A He was a principal in one or more entities represented by one of my partners over at Schnader Harrison and I worked on various matters related to those entities.

Q Were those communications related entities?

A Yes.

Q Broadcasting?

A Yes.

Q Who is the partner at Schnader

Harrison?

A Bob Beizer.

Q Do you recall whether one of those partner businesses was a television station in Honolulu?

I can I show you a document. This is not a memory contest. I'm just trying to fix approximately when you started your representation.

I'm providing it to the witness and the court reporter. Alan, do you need an extra copy?

MR. GEOLOT: Yes, if I could.

MR. COLE: Sure. No problem. An excerpt of a Petition for Leave to amend which was filed in MM Docket Number 83-727, a case captioned Family Media, Inc. in Honolulu, Hawaii, what we managed to find in the FCC's files was a Petition for Leave to Amend.

BY MR. COLE:

Q I have the full petition, if that

Q When did you stop representing Mr. Parker or any of his entities?

A I believe it was sometime perhaps in the fall of 1993 that I ceased representing him.

Q Between approximately 1983 and '84 and 1993, did you represent Mr. Parker and his entities continuously?

MR. GEOLOT: What do you mean by continuously?

BY MR. COLE:

Q Were there periods of time during that, let's call it a decade, during which you does not represent Mr. Parker?

MR. GEOLOT: I object to the form.

MR. COLE: I'm trying to find out whether or not Mr. Parker went away and came back or whether at all times there was an attorney-client relationship.

THE WITNESS: I don't really know. There may have been breaks between active work on matters, and he may have used other